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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHURCH OF SCIENTOLOGY OF CALIFORNIA, *Petitioner,*

v.

SHIRLEY FOLEY; JOHN T. MCGILL;
CHARLOTTE MURPHY; JUNE NORRIS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether an allegation of negligence provides a sufficient level of culpability to state a cause of action for damages arising from the alleged infringement or deprivation of constitutional rights secured by the First and/or Fifth Amendments?

2. Whether a cause of action for damages can be implied directly from the First Amendment guarantee of religious freedom?

3. Whether a cause of action for damages exists for the negligent compilation, maintenance, and dissemination of federal government records?

PARTIES TO THE PROCEEDINGS

Plaintiff-Appellant: Chruch of Scientology of California

Defendants-Appellees: Shirley Foley; John T. McGill; Charlotte Murphy; June Norris

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CHURCH OF SCIENTOLOGY OF CALIFORNIA, *Petitioner,*

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SHIRLEY FOLEY; JOHN T. MCGILL;
CHARLOTTE MURPHY; JUNE NORRIS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Church of Scientology of California, respectfully prays that a writ of certiorari issue to review the judgment entered in this proceeding on January 8, 1981, by the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc.*

OPINIONS BELOW

The decision of the United States District Court for the District of Columbia dismissing the amended com-

plaint in this case, rendered October 29, 1977, appears at 8a of the Appendix to this Petition. The majority opinion of the three-judge panel of the United States Court of Appeals for the District of Columbia Circuit, dated February 20, 1980, reversing the decision of the lower court, appears at 9a of the Appendix. A dissenting opinion filed on the same date by one member of that panel appears at 25a of the Appendix. The Court of Appeals, sitting *en banc,* entered judgment, set forth at 31a of the Appendix, on January 8, 1981, without an opinion, vacating the panel decision and affirming the judgment of the district court. That judgment, together with the concurring and dissenting opinions filed by members of the *en banc* panel, appears at 33a-53a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the District of Columia Circuit was entered on January 8, 1981. This petition is filed within 90 days of that judgment. Jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment I to the United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Amendment V to the United States Constitution

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

D.C. Code §12-301 (1973)

> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified

below from the time the right to maintain the action accrues: . . .

(4) for libel [or] slander, . . . — 1 year; . . .

(8) for which a limitation is not otherwise specially prescribed — 3 years. . . .

STATEMENT OF THE CASE

In March 1977 petitioner brought suit in the United States District Court for the District of Columbia against four current or former employees of the federal government, seeking damages in excess of $10,000 for alleged violations of petitioner's constitutional rights secured by the First and Fifth Amendments. The complaint was amended on September 8, 1977. Jurisdiction was based on 28 U.S.C. §§1331(a) and 1332.

In its amended complaint petitioner alleged that in November 1967 respondent Foley of the Department of Labor prepared a memorandum based in part on information furnished by respondents Murphy and Norris, who were employed at the time by the IRS, which contained knowingly false statements about the Church of Scientology and its founder. The memorandum was later disseminated to respondent McGill of the State Department.

According to the amended complaint the so-called Foley Memorandum "generally characterized the Church of Scientology as a fraudulent, secular and criminal organization given to illegal, macabre and terrorist practices" and contained several factual statements which "were, as defendants knew, or with the exercise of

reasonable care and due diligence should have known, false."[1] App. 3a.

Petitioner further alleged that the secret compilation and dissemination of the Foley Memorandum within the federal government "led to initiation of visa-revocation proceedings by the Immigration and Naturalization Service against an alien Scientologist minister, and to a long-term pattern of unremitting discrimination and harassment by government officials and agencies acting on the strength of the memorandum," App. 37a, including the revocation by the IRS of the Church's tax exemption in 1969, "based on the Foley report." App. 11a.[2]

Petitioner charged that the foregoing activities violated its Fifth Amendment right to due process of law, its First Amendment right freely to exercise its religious beliefs, and the common law of the District of Columbia governing the formation, maintenance and dissemination of government records. As a result, petitioner sought damages in excess of $10,000.

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[1] Among the statements complained of in the Foley Memorandum were the claims "that there was evidence that LSD and perhaps other drugs were widely used by assembled Church members; that an electric shock was administered to new members as a part of the Church's initiation ceremony; and that several persons in different parts of the United States had been shot, though not killed, because they had objected to the membership of their teen-aged children in the Church." App. 36a.

[2] The lower court's dismissal of petitioner's amended complaint on statute of limitations grounds necessarily deprived petitioner of developing through discovery its allegations of other constitutional infringements and damages arising from the compilation and dissemination of the Foley Memorandum. As the majority of the three-judge panel of the Court of Appeals held, "we do hold that plaintiff must be allowed to develop its case." App. 24a.

Petitioner alleged that it first learned of the existence of the Foley Memorandum in April 1975, when it obtained a copy through a Freedom of Information Act lawsuit.[3] Some 23 months later the original complaint was filed. Respondents have not answered the complaint, but instead moved to dismiss on the ground that petitioner's entire complaint was barred by the District of Columbia's one-year statute of limitation for defamation actions. After petitioner filed its amended complaint, the motion to dismiss was renewed. The District Court, without permitting any discovery or conducting a hearing, dismissed the amended complaint in a brief order, on the ground that the complaint sounded "most nearly in defamation" and "that the District of Columbia statute of limitations for one year for libel and slander governs this action." App. 8a.

Petitioner appealed, and a three-judge panel of the Court of Appeals for the District of Columbia Circuit reversed by a two-to-one vote. The Court agreed that dismissal was warranted to the extent the complaint was viewed as one for defamation. However, it held that "a single complaint may state multiple causes of action [requiring] the borrowing and application of more than one

[3] The Foley Memorandum was obtained by petitioner as a result of an FOIA request to the Los Angeles branch of the Immigration and Naturalization Service in April 1975. App. 6a. In November 1975 the Department of Labor "officially repudiated the Foley Memorandum and the statements contained therein as false and unfounded, and ordered copies thereof to be destroyed." App. 4a. The defendants have not denied, however, the allegations of the complaint that the secret existence and internal dissemination of the memorandum within the federal government had a severely adverse impact on petitioner and resulted in the denial of government benefits to which petitioner might otherwise have been entitled. Those allegations must, of course, for present purposes be taken as true.

statute of limitations," and that a plaintiff "may elect [its] remedies and recover when one claim, or even [its] central claim, is subject to dismissal for untimely filing." App. 13a. The majority concluded that petitioner's amended complaint, fairly read with all allegations accepted as true, set forth possible causes of action which did not sound in defamation, and which were thus not barred by the one-year statute of limitation, and that petitioner was prematurely precluded from developing its case.

The majority found that petitioner had adequately alleged a cause of action in negligence arising out of respondents' "duty to use due care in the preparation and maintenance of the government files at issue," App. 17a, and "the breach thereof, proximate cause, and damage resulting from defendants' allegedly tortious actions." App. 17a. The Court did not decide, however, whether respondents owed a duty of care to petitioner as alleged and expressly declined "to find that [petitioner] has a right of action arising under the Constitution." App. 18a. This determination, it held, could not be made without a fully developed factual record. Thus it remanded to permit petitioner the opportunity to develop its case.

One judge of the panel dissented on the ground that the complaint "stated a cause of action for defamation only and accordingly should be governed by the one-year limitation for libel and slander." App. 29a.

The case was heard by the Court of Appeals sitting *en banc*,[4] and a majority of the Court *en banc* vacated

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[4] Because Judge Bazelon, who wrote the majority opinion for the original panel, is a senior judge, he is not eligible to vote for or participate in *en banc* proceedings. Fed. R. App. P. 35(a); 28 U.S.C. §46(c).

the panel decision and affirmed *per curiam* the judgment of the district court, stating simply that the complaint "was properly dismissed by the District Court, basically for the reason stated in its order filed October 27, 1977." App. 32a.

Three members of the *en banc* panel joined in a dissenting opinion criticizing, first, the appropriateness of convening the Court *en banc* to consider a case in which "the majority panel opinion portends no conflict with our past holdings," App. 35a; and, second, the affirmance of the district court when it appeared that at least three potentially legitimate causes of action not sounding in defamation were suggested by petitioner's complaint. In the dissent's view the complaint fairly alleged the following:

> infringement of rights secured to the Church by the First and Fifth Amendments; breach of a due-care duty implicit in whatever federal statute or regulation purportedly authorized the activities in which [respondents] engaged; and common law negligence in the formation of governmental files. If any one of these claims is valid, the three-year limitation period may be legally viable. The issue, then, is whether the Church could have supported a claim for relief under one or more of these theories.

App. 47a-48a (footnotes omitted).

The dissent concluded that one or more of these theories might be viable, depending upon whether proof of the events alleged established the requisite elements of liability.

Petitioner seeks a writ of certiorari to review the dismissal of petitioner's amended complaint on the ground that it sounded only in defamation and, by necessary implication, stated no cause of action based on

petitioner's constitutional rights secured by the Fifth and First Amendments, or based on a duty of due care owed petitioner by respondents, or a cause of action for common law negligence.

REASONS FOR GRANTING THE WRIT

1. The *En Banc* Decision Of The Court Of Appeals Is In Conflict With Applicable Decisions Of This Court, Involves An Important Question Of Federal Law Not Settled By This Court, And Decides Such An Important Question In A Manner Which Conflicts With The Decisions Of Other Circuit Courts Of Appeals.

The Court of Appeals for the District of Columbia Circuit, sitting *en banc,* affirmed dismissal of petitioner's amended complaint on the ground that it only stated a common-law cause of action for defamation that was time-barred by the District of Columbia's one-year statute of limitations for such claims, D.C. Code §12-301(4) (1973). In so doing, the Court necessarily held that petitioner had not stated a cognizable cause of action for damages arising from the alleged infringement of its constitutional rights secured by the Fifth and First Amendments, or one arising under federal or local common law, none of which would be barred under the applicable provision of the District's statute of limitations. D.C. Code §12-301(8) (1973).

Davis v. *Passman,* 442 U.S. 228 (1979), held that" a cause of action and a damages remedy can . . . be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated." 442 U.S. at 230. Here, petitioner alleged that statements contained in the Foley Memorandum were false, that defendants knew or should have known them to be false, and that as a proximate result of the compilation, main-

tenance and dissemination of the report, of which petitioner was unaware, petitioner and its adherents suffered a variety of adverse government actions, including visa revocation proceedings, denial of petitioner's tax-exempt status as a bona fide religious organization, and others known and unknown to petitioner at this time.

Petitioner's complaint was dismissed summarily, without an answer being filed and without benefit of any discovery. In such circumstances it is well-settled that the complaint is to be construed in the light most favorable to the plaintiff and the court is duty bound to accept as true the allegations in the complaint. *Scheuer* v. *Rhodes,* 416 U.S. 232, 236 (1974); *Cruz* v. *Beto,* 405 U.S. 319, 322 (1972); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U.S. 172, 174-75 (1965). The "accepted rule" is that a complaint should not be dismissed summarily "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

Assuming the truth of the facts alleged and drawing therefrom all reasonable inferences in petitioner's favor, it is clear that the complaint stated claims for relief which did not sound in defamation and hence were not barred by the statute of limitations. As the D.C. Circuit itself has held in a closely analogous context, the conclusion that all claims "sound in defamation" when the injury complained of involves adverse action based on false information "mistakes particular items of damages for the tortious wrongs alleged in plaintiff's complaint." *Black* v. *Sheraton Corp.,* 564 F.2d 531, 540 (D.C. Cir. 1977). Likewise, the Third Circuit, in refusing to hold that a claim against the government for negligent maintenance of personnel files was barred by the libel

and slander exception to the Tort Claims Act, 28 U.S.C. §2680(h), reasoned that the critical issue was "the type of governmental activity that might cause harm, not . . . the type of harm caused." *Quinones* v. *United States*, 492 F.2d 1269, 1280 (3d Cir. 1974).

As the panel majority and the dissenters from the *en banc* decision in this case recognized, the gravamen of petitioner's complaint, viewed from one perspective, was that it and its adherents had been subjected to a possibly wide range of adverse government activity, not on the basis of a fair and objective assessment of the merits, but on the basis of secret decisions predicated upon utterly false information which had been (at best) negligently compiled, maintained and disseminated within the federal government. Such a claim rests upon a clear denial of procedural fairness — a breach of petitioner's right to due process.

The point is not whether Scientology ministers visiting this country were actually entitled to their visas or whether petitioner and other Scientology Churches were entitled to tax exempt status under the Internal Revenue Code, or whether any other adverse government activity was ultimately improper. The point is that petitioner and its co-religionists were entitled under the Fifth Amendment to be free from such adverse actions on the basis of secret decisions, secretly arrived at and predicated on false information compiled and maintained in the files of one government agency and secretly disseminated to others. As this Court has held repeatedly over the years,

> even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.

Perry v. *Sindermann*, 408 U.S. 593, 597 (1972).

Specifically, the government may not "foreclose a range of opportunities 'in a manner . . . that contravene[s] . . . Due Process.' " *Board of Regents* v. *Roth*, 408 U.S. 564, 574 (1972), *quoting Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238 (1957). This Court has elaborated this principle in a long series of decisions. *See, e.g., City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973); *Perry* v. *Sindermann, supra; Goldberg* v. *Kelly*, 397 U.S. 254 (1970). The principle has special application where, as here, there is a danger that the denial of governmental benefits may infringe upon — or may indeed be wholly or partly predicated upon — the exercise of protected First Amendment rights. *See, e.g., Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

There is, we submit, no doubt whatever that the *malicious* preparation, maintenance and dissemination of the Foley Memorandum, with its consequent denial of government benefits to petitioners and its co-religionists, would constitute an obvious denial of procedural due process. Petitioner, however, lacking access to any relevant information bearing upon respondents' state of mind, has not alleged malice, but only negligence. Thus the only issue bearing upon whether petitioner has stated a claim for relief under the Fifth Amendment is whether a claim for denial of constitutional rights must fall in the absence of any greater measure of culpability than negligence. This question has expressly been left open on at least two recent occasions by this Court, and may actually be presented by a third case recently argued here.

In *Procunier* v. *Navarette,* 434 U.S. 555 (1978), and *Baker* v. *McCollan,* 443 U.S. 137 (1979), this Court granted certiorari to determine whether a simple negligence theory stated a cause of action under 42 U.S.C. §1983. In each case the Court deferred deciding the question, holding instead that as a matter of law there had been no violation of constitutional rights in the circumstances involved. Again this Term, in a case just recently argued, the Court is considering petitioner's question whether "simple negligence, if proved, [may] form [the] basis of judgment under 42 U.S.C. §1983." *Paratt* v. *Taylor,* No. 79-1734, 49 U.S.L.W. 3102 (August 26, 1980).[5]

Unlike *Procunier* and *Baker,* however, the facts alleged here by petitioner, if proved, clearly make out deprivation "of a right 'secured by the Constitution. . . .' " *Baker* v. *McCollan,* 443 U.S. at 140. Whether the failure of federal officials to exercise due care, which allegedly deprived petitioner of its constitutional rights, may be the basis for liability has not definitively been answered by the Court and is an important question of federal law that should be resolved. *See Davis* v. *Passman,* 442 U.S. at 248. ("[A] plaintiff seeking a damages remedy under the Constitution must first demonstrate that his constitutional rights have been violated. We do not hold that every tort by a federal official may be redressed in damages.")

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[5] In this context there is conceptually no difference between an action against state officials under §1983 and one against federal officials brought directly under the Constitution. *See Paul* v. *Davis,* 424 U.S. 693, 702 n.3 (1976); *Butz* v. *Economou,* 438 U.S. 478, 504 (1978); *Reeves* v. *City of Jackson, Mississippi,* 608 F.2d 644, 649-50 n.2 (5th Cir. 1979).

In addition, there is a split among the Courts of Appeals as to whether a claim for deprivation of constitutional rights based on a theory of negligence will suffice to establish liability. For example, *compare Bonner* v. *Coughlin,* 545 F.2d 565, 567 (7th Cir. 1976) (*en banc*), *cert. denied*, 435 U.S. 932 (1978) ("[i]f Section 1983 is to be extended to cover claims based on mere negligence, the Supreme Court should lead the way"); *Page* v. *Sharpe,* 487 F.2d 567 (1st Cir. 1973); and *Corby* v. *Conboy*, 457 F.2d 251 (2d Cir. 1972); *with McCollan* v. *Tate,* 575 F.2d 509 (5th Cir. 1978), *rev'd on other grounds sub nom., Baker* v. *McCollan*, 443 U.S. 137 (1979); *Navarette* v. *Enomoto,* 536 F.2d 277 (9th Cir. 1976), *rev'd on other grounds sub nom., Procunier* v. *Navarette,* 434 U.S. 555 (1978); and *Carter* v. *Carlson,* 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds,* 409 U.S. 418 (1973).

The split in the Circuits concerning this issue affords an independent basis for granting the writ.

2. Whether A Cause Of Action For Damages May Be Implied Directly From The First Amendment Is An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Bivens v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), held that a cause of action for damages can be implied directly from alleged violations of the Fourth Amendment. *Davis* v. *Passman,* 442 U.S. 228 (1979), held that one can be implied directly from alleged violations of the Due Process Clause of the Fifth Amendment. *Carlson* v. *Green,* 446 U.S. 14 (1980), held that a cause of action for damages may also be implied directly from alleged violations of the Eighth Amendment.

In this case petitioner alleged that, as a proximate result of the acts of respondents, it was denied its First Amendment right freely to exercise its religious beliefs. Thus, fairly read in the light most favorable to petitioner, the amended complaint alleges that respondents' failure to exercise due care in the preparation, maintenance and dissemination of the Foley Memorandum infringed upon petitioner's right to exercise freely its religion without government intrusion. *See, e.g., Sherbert* v. *Verner,* 374 U.S. 398 (1963); *United States* v. *Ballard*, 322 U.S. 78 (1944); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

> It is not only the conclusions that may be reached by the [agency] which may impinge on rights guaranteed by the Religion Clauses but the very process of inquiry leading to findings and conclusions.

NLRB v. *Catholic Bishop*, 440 U.S. 490, 502 (1972).

First Amendment rights secured by the Constitution, of course, are among the most cherished. Yet the decision of the *en banc* Court necessarily held that petitioner had not stated a *Bivens* type cause of action for violation of its First Amendment rights.

Thus two important questions are presented by this aspect of the decision below. First, may a *Bivens* type claim for damages be implied from a denial of the right to free exercise of religion? Second, may such a claim be maintained in court upon allegations of no greater measure of culpability than negligence?

Both these questions are important questions of federal law which have not been, but should be, resolved by this Court. As to the first question, there is, of course, no dispute that a §1983 action may be predicated upon a denial of the right to free exercise of religion,

Cruz v. *Beto*, 405 U.S. 319 (1972); *Cooper* v. *Pate*, 378 U.S. 546 (1964), and there have been strong intimations in opinions of this Court that a *Bivens* type claim may be predicated upon infringement of other rights secured by the First Amendment. *See, e.g., Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274 (1977); *Procunier* v. *Navarette, supra. See also Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. at 399 (Harlan, J., concurring opinion) ("federal courts do have the power to award damages for violation of 'constitutionally protected interests.' "). Lower federal courts have, moreover, implied causes of action directly from the First Amendment. *Dellums* v. *Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Paton* v. *La Prade*, 524 F.2d 862, 869-70 (3d Cir. 1975); *Yiamouyiannis* v. *Chemical Abstracts Service*, 521 F.2d 1392, 1393 (6th Cir. 1975), and 578 F.2d 164 (6th Cir.), *cert. denied*, 439 U.S. 983 (1978).

As to the second question, it would not appear to differ analytically from the question whether negligence may form the predicate for *any Bivens* or §1983 claim, a question which, as noted above, this Court has expressly reserved in prior cases.

3. The *En Banc* Decision Is In Conflict With The Decisions Of Other Courts Of Appeals Insofar As It Precludes A Cause of Action In Negligence Against Respondents For Breaching Their Duty To Exercise Due Care In The Preparation And Maintenance Of Government Files.

In holding that petitioner's complaint stated a cause of action for defamation only, the Court of Appeals *en banc* declined to recognize the existence of a duty of due care imposed upon respondents under whatever authority they were operating or under federal or local common law to ensure responsible and accurate preparation, maintenance and dissemination of government records.

The decision is in conflict with *Quinones* v. *United States,* 492 F.2d 1269 (3d Cir. 1974).

Quinones held that the government owed plaintiff a duty of reasonable care in the maintenance of government compiled records affecting plaintiff, but expressly left open the question of whether that "duty is breached merely by permitting inaccurate information to be filed or by failing to file pertinent information." 492 F.2d at 1277. The Third Circuit distinguished between a cause of action sounding in defamation and one for negligence, found them to be conceptually distinct, and concluded that state law of libel and slander would not pre-empt a cause of action in negligence. 492 F.2d at 1273. In so holding, the Court relied upon the principles of modern federal pleading that a party may state "as many separate claims . . . as he has regardless of consistency," Fed. R. Civ. P. 8(e)(2), and that "in federal practice one civil remedy will not pre-empt others." 492 F.2d at 1275 and n.15.

Courts other than *Quinones* have imposed a duty of due care on government officials in the maintenance of government files. For example, *Bryan* v. *Jones,* 530 F.2d 1210, 1215 (5th Cir. 1976), *cert. denied,* 429 U.S. 865 (1976); *Tarlton* v. *Saxbe,* 507 F.2d 1116 (D.C. Cir. 1974); *Menard* v. *Saxbe,* 498 F.2d 1017 (D.C. Cir. 1974). *See Furtado* v. *Bishop,* 604 F.2d 80, 89 (1st Cir. 1979), *cert. denied,* 444 U.S. 1035 (1980).

Because the question of whether there is a common law duty to exercise due care imposed on government officials with respect to the compilation and maintenance of government records has not been addressed by this Court, and because the *en banc* decision in this case is in conflict with other appellate decisions holding that such a duty exists, the Court should grant the writ to resolve the question.

CONCLUSION

For the reasons stated, it is respectfully prayed that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

RESPECTFULLY SUBMITTED,

/s/ ROBERT A. SEEFRIED
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari were served on Wade H. McCree, Jr., Solicitor General, Department of Justice, 10th and Constitution Avenue, N.W., Room 5614, Washington, D.C., 20530, by depositing true copies thereof in the United States mail, first-class postage prepaid, on this 8th day of April 1981.

/s/ ROBERT A. SEEFRIED

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 77-0495

CHURCH OF SCIENTOLOGY OF CALIFORNIA, *Plaintiff,*
v.
SHIRLEY FOLEY, JOHN T. MCGILL,
CHARLOTTE MURPHY, JUNE NORRIS, *Defendants.*

Amended Complaint

(Damages for Negligent Deprivation of Constitutional Rights)

Plaintiff CHURCH OF SCIENTOLOGY OF CALIFORNIA appears herein by its attorneys and complaints of the aforenamed defendants as follows:

Jurisdiction And Venue

1. This is a civil action seeking compensatory damages from each of the defendants who, in their individual capacities as federal officials or agents, negligently caused injury to plaintiff in the exercise of its right to religious freedom.

2. This action arises under the First and Fifth Amendments to the United States Constitution and the common law of the District of Columbia. The amount in controversy exceeds $10,000.00, exclusive of interest and costs. Jurisdiction is conferred upon this Court by 28 U.S.C. §§1331(a) and 1332. Venue is properly laid in this district pursuant to 28 U.S.C. §1391.

Parties

3. Plaintiff is a nonprofit religious corporation duly organized and existing under the laws of the State of California. It is one of many worldwide churches and missions engaged exclusively in the promulgation, practice, preservation and defense of the religious faith known as "Scientology." Scientology services the spiritual needs and desires of its estimated six million parishioners and adherents throughout the United States and elsewhere who espouse this faith. It is an applied religious philosophy that seeks, through the use of pastoral counseling procedures, to enhance its members' knowledge of themselves and their Creator so that they may attain greater personal integrity, mental tranquility, and respect for themselves and others.

4. Each of the defendants is a citizen of the United States. Defendants FOLEY and MCGILL are residents of the District of Columbia. During the time of the incidents hereinafter mentioned, each defendant was an officer or agent of the United States of America, and their alleged acts were done under color of their federal authority.

5. Defendant SHIRLEY FOLEY is and, during the time of the incidents hereinafter mentioned, was an officer or agent of the United States Department of Labor.

6. Defendant JOHN T. MCGILL is and, during the time of the incidents hereinafter mentioned, was an officer or agent of the United States Department of State.

7. Defendant CHARLOTTE MURPHY was an attorney with the Internal Revenue Service of the United States Department of the Treasury (hereinafter referred to as the "IRS") during the time of the incidents hereinafter mentioned.

8. Defendant JUNE NORRIS was an attorney with and the supervisor of lawyers for the IRS during the time of the incidents hereinafter mentioned.

Violations

9. On or about November 29, 1967, defendant FOLEY prepared and wrote a memorandum about the Church of Scientology with the active encouragement, advice, aid and/or participation of defendants MURPHY and NORRIS. The report was the result of an investigation conducted by agents of the IRS concerning the Church of Scientology. This investigation was conducted to form an opinion as to whether the Church of Scientology should be considered a bona fide religious organization. The report listed defendants MURPHY and NORRIS as sources for information contained therein.

10. This memorandum (hereinafter referred to as the "Foley Memorandum") generally characterized the Church of Scientology as a fraudulent, secular and criminal organization given to illegal, macabre and terrorist practices. In support of this characterization, the Foley Memorandum made several factual statements, which included, among others, that "[t]here is evidence that LSD and perhaps other drugs are widely used by the [Scientology] members while assembled," that "[t]here is evidence that an initiation ceremony is held for all new members at which time an electric shock is administered to them," and that "[t]here is evidence that members of several families in different parts of the U.S. have been shot, but not killed by unknown persons because they have objected to their teen-age children becoming members."

11. These statements about the Church of Scientology were, as defendants knew, or with the exercise of reasonable care and due diligence should have known, false. On the basis of these false statements, the memorandum concluded that defendants MURPHY and NORRIS requested the Department of Labor to withhold alien employment certification from alien Scientologists applying for visas and work permits based on their being Scientology ministers.

12. Because of defendants' improper maintenance and dissemination of this Foley Memorandum, revocation proceedings were instituted by the Immigration and Naturaliza-

tion Service ("INS") against Reverend June Margaret Lake, a minister of plaintiff since 1960. Until 1967, Reverend Lake was a resident of Australia. After February 4, 1968, she resided in Miami, Florida on a B-2 visitor's visa. On October 18, 1968, she submitted an application for the adjustment of her status to that of a permanent resident under Section 245 of the Immigration and Nationality Act because she was a clergyman. Her application was approved by INS on December 18, 1968, pursuant to Section 101 (a) (27) (D) (i).

13. The Foley Memorandum, which was based upon reports given defendant FOLEY by defendants MURPHY and NORRIS, was disseminated on February 12, 1968 to defendant MCGILL by Charles E. Odell, Director of the United States Employment Service of the Department of Labor. Without questioning the credibility or reliability of the Foley Memorandum, defendant MCGILL disseminated this report on April 18, 1968 to the Los Angeles, California branch of the INS.

14. Thereafter, based upon the Foley Memorandum, a revocation proceeding was commenced against Reverend Lake on the ground the Department of Labor did not consider the Church of Scientology to be a bona fide religious organization. Consequently, the granting of waivers to Scientology visa applicants under 29 Code of Federal Regulations, Group III(a), (b) and (c) was considered inappropriate because Scientology ministers purportedly did not belong to a religious organization. While the revocation proceeding against Reverend Lake was contested successfully, plaintiff was forced to expend substantial time, effort and money to refute this warrantless proceeding.

15. In November, 1975, after plaintiff obtained a copy of the Foley Memorandum by means of a contested lawsuit under the Freedom of Information Act, the Department of Labor officially repudiated the Foley Memorandum and the statements contained therein as false and unfounded, and ordered copies thereof to be destroyed.

16. Upon information and belief, the Foley Memorandum served as the basis for other INS revocation proceedings and other adverse actions by a variety of government agencies from the late 1960's until its repudiation in 1975. Evidence of such other adverse actions, however, is not within plaintiff's possession. It can be obtained only through discovery of defendants and others, who are the sole repositories of such information.

17. As employees of the United States Government, each of the aforesaid defendants had a duty to exercise reasonable care and due diligence to ensure that information concerning plaintiff contained in government files compiled and maintained under their supervision was truthful and accurate, and said defendants further had the duty to reasonably avoid the dissemination of false and inaccurate information concerning plaintiff to government agencies and private individuals. However, said defendants, in breach of this duty, negligently prepared and/or disseminated the Foley Memorandum to other governmental agencies and private individuals although in the exercise of reasonable care, said defendants knew or should have known that the information upon which the Foley Memorandum was based as well as the information in the Foley Memorandum itself was false and inaccurate, and the defendants further knew or should have known that the Foley Memorandum and the false and inaccurate information therein would be relied upon by other governmental agencies and private individuals in their dealings with, and concerning plaintiff, its ministers, parishioners and adherents.

18. As the direct and proximate result of all the defendants' wrongful and negligent acts, plaintiff, other churches and missions of Scientology, as well as plaintiff's numerous clergy, parishioners and adherents, including persons sympathetically affiliated or identified with the religion of Scientology, were subjected to a pattern of unremitting, arbitrary discrimination and harassment by various governmental officers and agents acting upon the ostensibly official strength of the Foley Memorandum. In addition, the negligent

maintenance and dissemination of the Foley Memorandum, without reasonable safeguards designed to protect plaintiff's image, damaged plaintiff's ability to carry on its ordinary and normal functions.

19. While painfully aware since November 29, 1967 that it was the continuous object of arbitrary discrimination and harassment by numerous federal, state, local and foreign government departments, agencies and officers, plaintiff failed to discover, despite diligent and persistent efforts to do so, the identity of any individuals who caused such discrimination and harassment, or the means by which they did so, until April 17, 1975. At that time, a duplicate of the Foley Memorandum was disclosed by the Los Angeles, California branch of the INS to plaintiff for the first time pursuant to plaintiff's request under the Freedom of Information Act.

Injury To Plaintiff

20. As a direct and proximate result of the negligence of all the defendants', plaintiff has been:

(a) deprived of its rights to establish and freely exercise its religious beliefs in contravention of the First Amendment to the United States Constitution,

(b) deprived of its rights to due process of law in contravention of the Fifth Amendment to the United States Constitution,

(c) required to expend large sums of money for legal and related expenses to regain or attempt to regain these constitutional rights,

(d) hindered in its ability to attract and obtain financial contributions,

(e) hindered in its ability to attract and enlist parishioners and adherents in Scientology,

(f) arbitrarily discriminated against and harassed by other government departments and agencies, and their personnel, such as the Customs Service of the Department of Treasury and the Department of State.

21. The amount of monetary damage sustained by plaintiff is in excess of $10,000.00, although such damage cannot be ascertained until discovery is concluded.

Relief Requested

WHEREFORE, plaintiff requests that this Court find the defendants jointly and severally liable for the injuries suffered by it, and that the following relief be granted:

A. Compensatory damages in an amount to be ascertained, but at least in excess of $10,000.00;

B. Costs, disbursements and reasonable attorneys' fees; and

C. Such further relief as may be necessary and proper.

/s/ IRVING DROSS
Irving Dross
Attorney for Plaintiff
Suite 901
1700 K Street, N.W.
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DATED: September 8, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 77-0495

CHURCH OF SCIENTOLOGY OF CALIFORNIA, *Plaintiff,*
v.
SHIRLEY FOLEY, *et al., Defendants.*

Order

Upon consideration of Defendants' renewed motion to dismiss, and upon consideration of the opposition thereto, the amended complaint and the entire record herein, and this Court being bound to apply the most analagous statute of limitations of the jurisdiction in which the Court sits, *Johnson* v. *Railway Express, Inc.* 421 U.S. 454, 462 (1975), and the Court being persuaded that despite Plaintiff's emphasis upon negligence the allegations in Plaintiff's amended complaint sound most nearly in defamation, Prosser, *The Law of Torts*, §§30, 108 and 113 (3d ed.), Restatement (Second) of Torts, §§282, 558 and 580A and B (1977), and it therefore appearing that the District of Columbia statute of limitations of one year for libel and slander governs this action, D.C. Code §12-301(4), and whereas the activities complained of herein occurred in excess of one year from the filing of the lawsuit, it is by the Court this 27th day of October, 1977,

ORDERED, that Defendants' Motion to Dismiss be and it is hereby GRANTED, and this case is hereby DISMISSED.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-2134

CHURCH OF SCIENTOLOGY OF CALIFORNIA, APPELLANT

v.

SHIRLEY FOLEY, et al.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 77-0495)

Argued January 4, 1979

Decided February 20, 1980

Russell F. Canan, for appellant.

John R. Fisher, Assistant United States Attorney with whom *Earl J. Silbert* *, United States Attorney and *John*

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* United States Attorney at the time the brief was filed.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

A. Terry, Assistant United States Attorney were on the brief, for appellee.

Before: BAZELON, *Senior Circuit Judge*; WILKEY, *Circuit Judge* and PARKER **, *United States District Judge* for the District of Columbia

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Dissenting opinion filed by *Circuit Judge* WILKEY.

BAZELON, *Senior Circuit Judge*: In this action, the appellant, the Church of Scientology of California (Church), seeks compensatory damages from four federal employees (Defendants) for their role in the preparation and dissemination of an allegedly false memorandum concerning the Church. The complaint alleges that, as a result of the memorandum, the Church and those associated with it were subject to an eight-year program of harassment and discrimination by the government. The district court read the Church's complaint as sounding only in defamation, and dismissed the suit as time barred under the applicable statute of limitations. We find that the district court erred in reading the complaint so narrowly, and we remand for consideration of the Church's other allegations.

I.

Our knowledge of the facts in this case is limited because the trial court entered a protective order barring all discovery and dismissed the complaint before any responsive pleadings had been filed. From the materials available to us, however, the following account appears.

Defendant Shirley Foley wrote the memorandum in question for the Department of Labor on November 29, 1967, as part of an effort to determine whether the Church

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** Sitting by designation pursuant to 28 U.S.C. § 292(a).

qualified as a *bona fide* religious organization for the purpose of obtaining alien employment certification for its ministers.[1] In preparing the report, Foley was furnished information by defendants Charlotte Murphy and June Norris, attorneys with the Internal Revenue Service (IRS). Their information had been acquired in prior IRS investigations of the Church.[2] Upon its completion, the memorandum was forwarded by the Department of Labor to defendant John McGill, chief of the Advisory Opinions Division, Visa Office, Department of State.[3] He

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[1] Apparently, the report was written in response to a request by the Immigration and Naturalization Service (INS) for a determination whether an alien Scientologist qualified for a visa exemption as a minister of a *bona fide* religious organization. *See* 29 C.F.R. §§ 60.2(1), 60.6 (1968) (currently codified and amended at 20 C.F.R. § 656.22(g)(1) (1970)). An alien minister automatically qualifies for a visa as a "special immigrant" provided that he or she is:

> an immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of carrying on the vocation of minister of a religious denomination, and whose services are needed by such religious denomination having a bona fide organization in the United States; [or] the spouse or the child of any such immigrant, if accompanying or following to join him.

8 U.S.C. § 1101(a)(27)(C)(i) (1976).

[2] The IRS ultimately revoked the Church's tax exemption in 1969. Internal Revenue Bulletin 1969-51 (December 22, 1969). The Church alleges that the IRS revocation was partially based on the Foley report. In 1976, after protracted litigation, *see* Handeland v. Commissioner of Internal Revenue, 519 F.2d 327, 330-31 (9th Cir. 1975), the IRS abandoned its previous position and reinstated the tax exemption. IRS Announcement 76-119, IRB 1976-37.

[3] Opinions issued by the Advisory Opinions Division guide the determinations of consular officers in granting visas to ministers of *bona fide* religious denominations. *See* 22 C.F.R. § 42.25 (1978).

in turn disseminated the report to an INS branch office where allegedly it was in part responsible for the institution of at least one visa revocation proceeding directed against an alien Scientologist minister.

The report characterized the Church as a criminal secular organization.[4] It alleged that the use of LSD and perhaps other drugs was common among members of the Church, that parents who objected to their children's conversion had been "shot but not killed," and that electric shocks were administered to converts as a ritualistic practice. The Church obtained a copy of the report in April 1975 after a contested Freedom of Information Act proceeding. Seven months later, the Department of Labor officially repudiated the report and ordered all copies of the report to be removed from its files and destroyed. In March 1977, 23 months after receiving a copy of the report, the Church filed this action.

Defendants moved for a protective order and for dismissal under the District of Columbia's one-year statute of limitations for defamation.[5] The trial judge granted defendants' motion for a protective order but allowed the Church to file an amended complaint. The amended pleading was captioned as an action for the "negligent deprivation of constitutional rights," which the Church asserted was subject to the District of Columbia's three-year limitation period for negligence.[6] Without a hearing the trial court then ruled that the action was governed by the one-year limitation period for defamation. It therefore dismissed the complaint.

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[4] This summary of the Foley report appears in the Plaintiff's Amended Complaint, Appendix (App.) at 32, and has not been disputed by the defendants.

[5] D.C. § 12-301 (4).

[6] D.C. § 12-301 (8).

II.

The trial court was correct in its determination that dismissal of the Church's complaint is warranted to the extent the complaint is one for defamation.[7] However, a single complaint may state multiple causes of action and thus require the borrowing and application of more than one statute of limitations.[8] A plaintiff may elect his remedies and recover when one claim, or even his central claim, is subject to dismissal for untimely filing.[9] The question therefore is whether the Church has alleged facts that might be construed to set forth a cause of action other than defamation, one for which the claims would be timely.

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[7] Because Congress has not prescribed a statutory limitation period for the Church's claims, the trial court properly determined that this action is governed by the "analogous" District of Columbia statute of limitations. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975); Fitzgerald v. Seamans, 553 F.2d 220, 223 n.3 (D.C. Cir. 1977).

[8] *See* Williams v. Marsh, 558 F.2d 667, 670 (2d Cir. 1977) ("well settled" that multiple causes of action may require borrowing of different limitation periods).

[9] *See* D. S. Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973) (although "wounding" action brought by victim shot by allegedly intoxicated police officer was barred by one-year limitation period of D.C. 12-301(4), a separate claim based on negligence was timely under three-year limitation period in D.C. § 12-301(8)); Shifren v. Wilson, 412 F. Supp. 1282, 1301-02 (D.D.C. 1976). *Cf.* Black v. Sheraton Corp. of America, 564 F.2d 531, 540-41 (D.C. Cir. 1977) (although defamation action was precluded by Federal Tort Claims Act, plaintiff may recover for injury to reputation in invasion of privacy and physical trespass action); Rogers v. United States, 397 F.2d 12, 15 (4th Cir. 1968) (claim that U.S. Marshal negligently permitted plaintiff to be imprisoned and beaten "is founded upon negligence even though assault or false imprisonment may be collaterally involved").

The Federal Rules of Civil Procedure require only a generalized statement of the facts, "a short and plain statement of the claim showing that the pleader is entitled to relief." [10] The liberal concepts of notice pleading do not require the pleading of legal theories.[11] Indeed, absent prejudice to the defendant on the merits, a court may deny a motion to dismiss, or even one for summary judgment, on the basis of a legal theory never advanced by the plaintiff, so long as that theory is supported by the facts alleged.[12]

When considering a motion to dismiss, a trial court is required to take as true all the allegations in a plaintiff's complaint,[13] and the complaint itself is construed in the light most favorable to the plaintiff.[14] Dismissal is improper unless it appears "beyond doubt" that the plaintiff's allegations do not state any valid claim for relief. As the Supreme Court put the test:

> [I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[15]

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[10] Fed. R. Civ. P. 8(a).

[11] Siegelman v. Cunard White Star, 221 F.2d 189 (2d Cir. 1955).

[12] Dotschay v. National Mutual Ins. Co., 246 F.2d 221, 223 (5th Cir. 1957); International Distributing Corp. v. American District Telegraph Co., 569 F.2d 136, 139 (D.C. Cir. 1977).

[13] Cruz v. Beto, 405 U.S. 319 (1972).

[14] Martin v. King, 417 F.2d 458 (10th Cir., 1969).

[15] Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Thus, the trial court is under a duty to determine if the allegations provide for relief on any possible theory.[16] The presumption against a dismissal on the pleadings is intensified when, as with the non-defamation claims here, an asserted theory of liability presents novel legal issues that ordinarily should be resolved only after discovery and a trial on the merits.[17]

These general principles governing motions to dismiss apply with equal force where the basis of the motion is an allegation that all of the claims found in a complaint are time barred.[18] In the instant case the appellees thus bear the heavy burden of proving that the Church's complaint does not raise any timely claims.

III.

The Church's complaint avers that the report contains statements that the defendants knew, or with the exercise of due diligence should have known, were false. It further avers that the defendants on their own initiative caused the report to be compiled and maintained with the purpose and intent of directly and proximately causing the Church to be subjected to harassment and persecution by numerous governmental agencies for an eight-year period between 1967 and 1975. The report is alleged to have deprived the Church of its rights to establish and freely exercise its religion, to have violated the Church's

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[16] Quinonez v. National Ass'n of Secs. Dealers, Inc., 540 F.2d 824 (C.A. 5th, 1976); Bonner v. Circuit Ct. of the City of St. Louis, Missouri, 526 F.2d 1331 (C.A. 8th, 1975), *certiorari denied*, 424 U.S. 946; U.S. v. Howell, 318 F.2d 162 (C.A. 9th, 1963).

[17] Shull v. Pilot Life Ins. Co., 313 F.2d 626, 629 (5th Cir. 1963). *See generally* 5 Wright & Miller, Federal Practice and Procedure, § 1357 (1969).

[18] 5 Wright & Miller, Federal Practice and Procedure § 1357 (1969).

due process rights, to have hindered its ability to attract contributions and enlist adherents, and to have required the Church to expend large sums for legal and related expenses to retain or regain its rights. Although, as the lower court held, these allegations set forth an action in defamation,[19] the complaint focuses not only on the defendants' role in disseminating the Foley report after it had been prepared (defamation), but also on their role in compiling and maintaining the report.[20] The Church

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[19] To state a cause of action for defamation, plaintiff must allege the defamatory nature of a communication to some third person, that the communication referred to the plaintiff, that the third party understood the defamatory nature of the communication and its reference to the plaintiffs, and (in most circumstances) malice. *See generally* W. Prosser, Law of Torts § 112, at 737-76 (4th ed. 1971). When the communication imputes the commission of a crime, as in the instant case, damages are presumed and a claim of injury or the proof of special damages is unnecessary. *Id.* at 754-56, 762-63.

[20] The most important distinction between the two torts is that communication, an essential element of an action for defamation, is unnecessary for an action based upon the tortious compilation and maintenance of records. Communication is relevant to the latter claim only for determining the propriety and amount of damages.

This distinction was the basis of the Third Circuit's opinion in Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974). In *Quinones*, the court reversed the dismissal of a Federal Tort Claims Act complaint alleging that a federal agency had violated its duty to maintain accurate employment records by disseminating unfavorable references to prospective employers of a former employee. The court rejected the argument that the libel and slander exception to the FTCA precluded a damage action for negligent maintenance. The court reasoned that "[i]t is not the publication of the incorrect employment history and record that serves as the foundation of the plaintiff's complaint; it is the method in which the defendant maintained the record of his employment that is being criticized." *Id.* at 1276. As this court held in Black v.

claims that the defendants' actions constitute a breach of their duty to ensure that government files compiled and maintained under their personal supervision are truthful and accurate. The Church went to considerable lengths in its complaint to detail the duty, the breach thereof, proximate cause, and damage resulting from defendants' allegedly tortious actions.

The existence *vel non* of the Church's non-defamation claims turn on whether the appellees had a duty to use due care in the preparation and maintenance of the government files at issue. In general, "[w]hen an agency of the United States voluntarily undertakes a task, it can be held to have accepted the duty of performing that task with due care." [21] And, we have previously recognized the duty of some government agencies to use due care in maintaining files.[22] Here, because of the limitations imposed on discovery by the trial judge and the dismissal of the Church's action at the pleading stage, there are significant gaps in the record. Most critically, we do not know the legislative or regulatory authority under which the defendants prepared, maintained and utilized the Foley memorandum. Consequently, it is impossible at this stage to determine definitively whether the appellees owed a duty of due care to appellant. But

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Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977), a contrary argument "mistakes particular items of damages for the tortious wrong alleged in plaintiff's complaint." *Id.* at 540.

[21] Rogers v. United States, 397 F.2d 12, 14 (4th Cir. 1968). *See also* Quinones v. United States, 492 F.2d 1269, 1278 (3d Cir. 1974); Gibson v. United States, 457 F.2d 1391, 1394 (3d Cir. 1972).

[22] *See* Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974) (duty to use due care in the maintenance of criminal records under 28 U.S.C. § 534 (1976)); Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974) (same). *Cf.* Chastain v. Kelley, 510 F.2d 1232 (D.C. Cir. 1975) (duty to correct erroneous FBI administrative records).

precisely because of this uncertainty, we believe the district court erred in refusing to allow the appellant to develop its non-defamation claim. Both the ordinary duty of an agency to perform its tasks with due care,[23] and the spirit that animates the Federal Rules supports construing the Church's complaint so as to avoid the premature termination of litigation.[24] We, therefore, conclude that it was improper for the district court to refuse to allow the appellant to develop its claim.[25]

In so holding, we expressly decline to find that the appellant has a right of action arising under the Constitu-

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[23] *See* note 21 *supra*.

[24] *See* Section II *supra*.

[25] Judge Wilkey argues in dissent that "[a]ll of the elements of an action for defamation are present on the face of the complaint." Dissent at 3. We agree. But Judge Wilkey moves from this common ground to the assertion that the complaint "should be construed as one for defamation *only*." Dissent at 3 (emphasis added). We disagree. It is elementary that the same transaction and occurrence may give rise to more than one cause of action. Judge Wilkey's assertion depends upon the proposition that "[t]he mere compilation and maintenance of inaccurate information . . . standing alone inflicted no injury or impact on the appellant and thus gave rise to no independent claims for relief." Dissent at 4. No support is offered for this proposition. In fact, the case law is to the contrary. *See, e.g.*, Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974).

In attempting to distinguish *Quinones*, Judge Wilkey alleges that applying it to the case at hand "misinterprets the nature and substance of the wrong appellant alleges" because "communication . . . *is* the foundation of appellant's claim for relief." Dissent at 4 n.12. But, this statement begs the issue of whether the appellant's complaint can be read as stating a cause of action distinct from defamation, one expressly authorized by the *Quinones* case. Moreover, in reading the appellant's complaint so narrowly, Judge Wilkey ignores the principle that a court faced with a 12(b)(6) motion must extend every favor to the pleading party. *See* pages 6-7 *supra* and nn.11-18.

tion. However, the allegation that the challenged governmental activity adversely affects individual rights secured under the Constitution accentuates the importance of due care in this context. Our decisions in *Tarlton v. Saxbe* [26] and *Menard v. Saxbe* [27] are instructive on this point. In those cases, we held that the FBI had a duty to maintain accurate criminal records in the exercise of its recordkeeping functions pursuant to 28 U.S.C. § 534 (1976). We based our holding on our perception that the records at issue involved "a particularly sensitive area of the law, concerning the developing relationship between values of individual privacy and the record-keeping functions of the executive branch." [28] We found that in such an area of the law the responsibility to maintain records included a corollary responsibility to take reasonable care to avoid injury to innocent citizens. We were reluctant, absent the clearest statement of Congressional policy, to reach a contrary ruling that would impute to Congress an intent to authorize the FBI to harm innocent individuals. Our reluctance was intensified by the grave constitutional issues that would be raised by any such Congressional grant.[29]

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[26] 507 F.2d 1116 (D.C. Cir. 1974).

[27] 498 F.2d 1017 (D.C. Cir. 1974).

[28] Tarlton v. Saxbe, 507 F.2d 1116, 1121 (D.C. Cir. 1974) (footnotes omitted).

[29] Judge Wilkey attempts to distinguish *Tarlton* and *Menard* from the case at bar by noting that they were criminal cases. Dissent at n.4. But Judge Wilkey does not deny that in those cases, a duty to maintain accurate files was imposed without regard to whether the inaccurate information had been communicated. Moreover, the sensitivity of the court to the need for accurate files in the criminal area does not

Such concerns argue even more forcefully for the existence of a duty to compile and maintain accurate files concerning whether an organization is a bona fide religious group. Although such determinations are constitutionally permissible in order that "secular organizations may not unjustly enjoy the immunities granted to the sacred," [30] they require a degree of delicacy even greater than that at issue in *Tarlton*.[31] The Constitution itself, with its concern to avoid government suppression of religious belief, arguably may create the duty to make such determinations with the necessary due care.[32] We do not resolve that issue. But, at the least, the presence of a threat to important constitutional interests requires us—as it should have required the district court—to permit the appellant to make its case that Congress, in passing the statute that authorized the activity of the appellees, intended to require due care in its execution.

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belie the need for a similar sensitivity where important constitutional rights are potentially involved, as in this case.

[30] Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969).

[31] *See* United States v. Ballard, 322 U.S. 78, 86-87 (1944) (First Amendment prohibits government inquiry into truth or falsity of religious belief; sincerity is proper inquiry). Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[32] Although we do not reach the constitutional issue in the present case, it is well established that damages may be recovered directly under the Constitution for violations of both First and Fifth Amendment rights. *E.g.*, Davis v. Passman, —— U.S. ——, —— (1979) (Fifth Amendment); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281-86 (1977) (First and Fourteenth Amendments); Dellums v. Powell, 566 F.2d 167, 194-96 (D.C. Cir. 1977) (First Amendment); Paton v. La Prade, 524 F.2d 862, 869-72 (3d Cir. 1975) (First Amendment).

IV.

Appellees' arguments against the recognition of a duty of due care in this context are unpersuasive. Their reliance on *Barr v. Matteo*[33] as evidence of a "national policy" that government employees should not be hampered in their writing has been significantly undercut by the Supreme Court's holding in *Butz v. Economu.*[34] Furthermore, the burden imposed on federal employees by our holding is minimal. Unlike the files at issue in *Tarlton*, we are not confronted by a system containing millions of files whose contents were determined by local officials beyond the jurisdiction of the court. Federal, not local, employees possessed the factual information necessary to substantiate the Foley report and federal employees were responsible for its ultimate disposition. Although these distinctions obviously do not serve to render considerations of cost and administrative efficiency insignificant, they do serve to lessen the burden imposed by a duty of due care.

That the Foley report already has been expunged from the Department of Labor's files does not undermine the Church's tort claims. Plaintiffs generally have standing to bring an action for the negligent maintenance of

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[33] 360 U.S. 564 (1959).

[34] 438 U.S. 478 (1978). Though the decision in *Butz* treated specifically a claim to absolute immunity for federal *executive* officials, the principles it enunciated are no less applicable to lesser employees of the federal government.

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law: 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the least, are creatures of the law and are bound to obey it.' [Citation omitted.] *Id.* at 506.

records only when such maintenance results in "injuries and dangers" that are "plain enough." [35] Almost always that injury or danger is based on the possibility or probability of harm resulting from the dissemination of the records. When, as here, dissemination and consequent injury allegedly has already occurred, expungement is not remedial or even relevant to the plaintiff's claims. Although commendable, the Department of Labor's actions in expunging the Foley report does not serve to extinguish the Church's claims.[36]

We also find no basis for defendant's assertion that this tort claim is improper because it was not brought against the actual custodian of the records, the head of the administrative agency involved. This practice was merely the consequence of the desired remedy in other cases—an alteration of an existing record—and not due to any substantive limitation on liability. The defendants allegedly were responsible for the compilation and maintenance of the report. The defendants have not suggested, nor have we been able to discover, any rationale that would justify relieving them of liability because they may not have been the actual custodians of the Foley report.[37]

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[35] Sullivan v. Murphy, 478 F.2d 938, 970 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973); *see* Paton v. LaPrade, 524 F.2d 862, 867-68 (3d Cir. 1975); Menard v. Sacbe, *supra*, 498 F.2d at 1023.

[36] In the case when no injury as yet has occurred, expungement in fact may be the only proper remedy. We express no opinion on this issue.

[37] *Cf.* Carter v. Carlson, 447 F.2d 38, 361 (D.C. Cir. 1971), *rev'd on other grounds*, 409 U.S. 418 (1972) ("[A] government officer, like any other person, is liable at common law for his torts, even if they are committed within the scope of his employment.").

We also find no merit in the defendant's claim that expungement is the single remedy for the negligent compilation and maintenance of files. The ordinary and almost invariable remedy for tort claims is damages.[38] To paraphrase Justice Harlan, "[f]or people in the [Church's] shoes it is damages or nothing." [39] It would be anomolous to limit the remedy for the Church's tort claim to the equitable remedy of expungement.[40] In *Davis v. Passman*, the Supreme Court recognized that "the question of whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." [41] Once it is recognized that a statute creates an implied

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[38] *Cf.* Bivens v. Six Unknown Federal Narcotics Agencys, 403 U.S. 388, 395 (1971).

[39] *Id.*

[40] Finally it should be noted that we reject the defendants' argument that this action accrued on November 29, 1967 when the memorandum was written. Defendants' deliberate concealment of this memorandum, as evidenced by its reluctant production only after a contested FOIA proceeding, tolls the operation of the limitation period until that date. Although state law controls in determining the applicable limitation period, federal law determines when the period begins to run. Martin v. Merola, 535 F.2d 191, 195 n.7 (2d Cir. 1976) (per curiam). The settled federal rule is that fraud or deliberate concealment of material facts relating to defendant's wrongdoing tolls the statute until plaintiff discovers, or by reasonable diligence could have discovered the basis of the lawsuit. Briley v. California, 564 F.2d 849, 855 (9th Cir. 1977); Fitzgerald v. Seamans, 180 U.S.App.D.C. 75, 83, 553 F.2d 220, 228 (1977); Jones v. Rogers Memorial Hospital, 143 U.S.App. D.C. 51, 442 F.2d 773 (1971); W. J. Emmett v. Eastern Dispensary & Casualty Hospital, 396 F.2d 931, 936-37 (D.C. Cir. 1967).

[41] Davis v. Passman — —U.S. ——, —— (1979).

right of action, courts have wide discretion in fashioning available relief.[42]

CONCLUSION

Our holding is a limited one, due in part to the fact that the inquiry below was truncated. The defendants have not asserted, and the plaintiff was not permitted to ascertain, the statutory or regulatory basis of the activities challenged in this case. We therefore cannot determine the existence *vel non* of a duty of due care under the relevant provision. However, we do discern a general duty of government to perform its tasks with care—a duty we have previously held applicable to the compilation and maintenance of files. And, we are alert to enforce that duty especially where important constitutional interests might be compromised by less diligence. In the instant case, the district court erred in not reading the appellant's complaint liberally so as to permit the development of a cause of action other than defamation. We do not pass on the merits of that claim, and it may be that the district court will find that the relevant statute or regulation does not embody the general duty described here. But we do hold that the plaintiff must be allowed to develop its case.

Reversed and remanded.

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[42] Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969) ("The existence of a statutory right implies the existence of all necessary and appropriate remedies."). Bell v. Hood, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal court may use an available remedy to make good the wrong done.")

WILKEY, *Circuit Judge*, dissenting: As the majority correctly notes, this action is governed by the "analogous" District of Columbia statute of limitations.[1] That statute directs attention, however, to the *purpose* of an action for determining which specific proscription is applicable: "[A]ctions for the following *purposes* may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues."[2] And this court quite logically has construed that language as mandating an inquiry into the "nature of the injury involved rather than to the legal theories available for its redress."[3] Nevertheless the majority holds that the district court erred in not permitting appellant to develop a cause of action in negligence, premised on a possible statutory obligation on the part of the government and its employees to take reasonable precautions to assure the accuracy of its files.[4]

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[1] *See* Majority op. at 5 n.7.

[2] 12 D.C. Code § 301 (1973) (emphasis added).

[3] *District of Columbia Armory Bd.* v. *Volkert*, 402 F.2d 215, 220 (D.C. Cir. 1968). In *Volkert*, plaintiff sued the supplier and architect firm responsible for the construction of the D.C. stadium after defects occurred in the stadium. Although the underlying theory of liability alleged was negligence, the *purpose* of the action was to recover damages for injury to the property. Thus the court held that the provision "for the recovery of damages for an injury to real or personal property," 12 D.C. Code § 301(3), stated the applicable limitation period.

[4] In directing the district court to explore the issue of whether the government and its employees had a statutory duty in this instance to take reasonable measures to assure the truthfulness of information in its files, the majority relies in part on this court's decisions in *Tarlton* v. *Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974), and *Menard* v. *Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974), in which the court found a statutory obligation on the part of the FBI to safeguard the accuracy of information in its criminal files. Those cases do not support a

In so holding, the majority misconceives the nature of the wrong appellant alleges. In my view, this suit sounds only in defamation; its *purpose is to redress the injury* that appellant allegedly sustained to its reputation as a *result of the dissemination* of false information to third parties.[5] Thus I would affirm the district court's holding that the action was barred by the one-year statute of limitations for libel and slander.[3]

The elements in an action for defamation may be set forth as follows:

> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[7]

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broad, general obligation on the part of government agencies to assure the accuracy of information contained in government files; those decisions instead were based on a specific statute that applied only to the FBI. Moreover, it was essential to the court's decisions that the FBI files consisted of *criminal* records, in part because of the court's sensitivity to the adverse legal, economic, and social effects that an individual may experience as a result of a criminal record.

[5] To the extent that appellant attempts to obtain relief against the government for the action of its employees, an action for libel or slander of course will not lie. Section 2680(h) of the Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1976), grants the government immunity for suits based on libel or slander for injuries caused by government employees.

[6] *See* 12 D.C. Code § 301(8) (1973).

[7] RESTATEMENT (SECOND) OF TORTS § 558 (1976).

Apart from constitutional restraints,[8] then, an action for libel or slander may be predicated on intentional, reckless, or negligent behavior. An action for defamation is characterized *not* by whether the underlying conduct was negligent, reckless, or intentional, but by the interest sought to be protected—that of reputation. Thus "it is essential to tort liability for either libel or slander that the defamation be *communicated* to some one other than the person defamed." [9]

Applying these fundamental principles of tort law to the complaint at bar, in my view it is clear that it should be construed as an action for defamation only. Appellant maintains that defendants breached their duty to exercise reasonable care to ensure that information in the government files was truthful and accurate, and reasonably to avoid the dissemination of false information concerning appellant to government agencies and private individuals.[10] As a result, appellant avers that it has been "hindered in its ability to attract and obtain financial contributions" and in its ability "to attract and enlist parishioners and adherents in Scientology." [11]

All of the elements of an action for defamation are present on the face of the complaint: a false and defamatory statement concerning the appellant, fault amounting to negligence with respect to ascertaining the

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[8] *E.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

[9] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 766 (4th ed. 1971 (footnote omitted; emphasis added).

[10] Amended Complaint ¶ 17, *reprinted in* Joint Appendix (J.A.) at 30, 34.

[11] *Id.* ¶ 20(d), (e), *reprinted in* J.A. at 36. Appellant also claims that it was deprived of its first amendment rights. The majority expressly declined to find a right of action arising under the Constitution, however. Majority op. at 10-11.

truth or falsity of the information, publication or communication of the false statement to third parties, and injury to reputation as a result. *The allegation of negligence in the complaint thus in no way distinguishes it from one for libel or slander*; defendants' alleged failure to take reasonable measures to assure the accuracy of information within their files, which the majority finds may state an independent cause of action, is instead *only an element of the tort of defamation.* The mere compilation and maintenance of inaccurate information—whether this task was performed recklessly, intentionally, *or* negligently—standing alone inflicted no injury or impact on the appellant and thus gave rise to no independent claim for relief.[12] *Clearly the gravamen of appellant's complaint is the communication of such information to third parties.* Only when the Foley memorandum was communicated to others did appellant suffer any adverse effects for which an action might lie.[13] *It is equally*

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[12] It is an elementary principle of tort law that no claim for relief accrues until some harm or injury has been sustained by one person as the result of the conduct of another. *See* W. PROSSER, *supra* note 9, at 6.

[13] In footnote 20 of its opinion, the majority cites two cases as support for its holding that the appellant may have an independent cause of action for the negligent maintenance of files: *Quinones* v. *United States*, 492 F.2d 1269 (3d Cir. 1974); and *Black* v. *Sheraton Corp.*, 564 F.2d 531 (D.C. Cir. 1977). The majority quotes approvingly the language from *Quinones* that "[i]t is not the publication of the incorrect employment history and record that serves as the foundation of the plaintiff's complaint, it is the method in which the defendant maintained the record of his employment that is being criticized." Applying that court's reasoning to this case, in my opinion misinterprets the nature and substance of the wrong appellant alleges in its complaint. To repeat, the communciation of the Foley memorandum *is* the foundation of appellant's claim for relief. Appellant suffered no impact from the mere maintenance of the files; any adverse

clear that the injury that appellant claims to have suffered—inability to obtain financial contributions and enlist adherents in Scientology—*is an allegation of injury to reputation, precisely the interest that an action for libel or slander is designed to protect.*[14]

In sum, looking, as the District of Columbia statute of limitations directs, to the nature of the wrong involved—injury to reputation as a result of the communication of false information to third parties—it seems clear that the complaint should be read as stating a cause of action for defamation only and accordingly should be governed by the one-year limitation for libel and slander.[15] Because appellant failed to bring the action

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effect followed only from the communication of the report to others.

Black is readily distinguishable from the case at bar. In that case, plaintiff claimed a deprivation of his constitutional rights, as well as loss of employment and reputation as a result of the communication of information obtained from an illegal eavesdropping. Unlike the present case, the foundation of plaintiff's complaint was not the communication of information obtained, but the illegal entry and eavesdropping itself, which violated plaintiff's interest in privacy and interest in the integrity of his premises. Thus the court correctly found that the injury to reputation was only an item of damages incidental to the basic wrongs alleged—invasion of privacy and trespass.

[14] For example, one may be liable to a nonprofit corporation in defamation if the organization is dependent upon financial support from the public and the defamatory matter "tends to interfere with its activities by prejudicing it in public estimation." RESTATEMENT (SECOND) OF TORTS § 561(b) (1976).

[15] While, as Judge Bazelon emphasizes, a trial court is constrained to construe a complaint in the light most favorable to the plaintiff when faced with a motion to dismiss under rule 12(b)(6), liberal concepts of pleading do not permit the court to read into a complaint a claim for relief if, as is true in this

until twenty-three months after learning of the existence of the Foley memorandum, the action is untimely. I therefore would affirm the order of the district court.

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case, it is clear beyond doubt that *none* is stated. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

No. 77-2134

CHURCH OF SCIENTOLOGY OF CALIFORNIA, APPELLANT

v.

SHIRLEY FOLEY *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 77-0495)

Argued October 20, 1980

Decided January 8, 1981

Russell F. Canan, with whom *Ann Dobmeyer* was on the brief, for appellant.

Mary A. McReynolds, Attorney, Department of Justice, with whom *Charles F. C. Ruff*, United States Attorney, and *Barbara L. Herwig*, Attorney, Department of Justice, were on the brief, for appellees. *John A. Terry* and *John R. Fisher*, Assistant United States Attorneys, also entered appearances for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before WRIGHT, *Chief Judge*, and MCGOWAN, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS, and GINSBURG, *Circuit Judges*.

Judgment *per curiam*.

Concurring opinion filed by *Circuit Judge* MACKINNON.

Dissenting opinion, in which *Circuit Judges* EDWARDS and GINSBURG join, filed by *Circuit Judge* ROBINSON.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia and was argued by counsel before the court *en banc*. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

This court is of the view that the complaint filed in this case was properly dismissed by the District Court, basically for the reason stated in its order filed October 27, 1977.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

MACKINNON, *Circuit Judge*. (Concurring) In my opinion *en banc* rehearing was necessary to maintain the uniformity of our decisions.

In dissenting from the panel opinion in this case Judge Wilkey stated

> this court quite logically has construed that language [of the D.C. statute of limitations] as mandating an inquiry into the "*nature of the injury involved* rather than to the legal theories available for its redress." [Emphasis added.]

Footnote 3 was cited in support of this assertion, as follows:

> [3]*District of Columbia Armory Bd. v. Volkert*, 402 F.2d 215, 220 (D.C. Cir. 1968). In *Volkert*, plaintiff sued the supplier and architect firm responsible for the construction of the D.C. stadium after defects occurred in the stadium. Although the underlying theory of liability alleged was negligence, the *purpose* of the action was to recover damages for injury to the property. Thus the court held that the provision "for the recovery of damages for an injury to real or personal property," 12 D.C. Code § 301(3), stated the applicable limitation period.

The dissent takes the position that three potential claims have been suggested: *First*, infringement of appellant's rights under the First and Fifth Amendments. *Second*, breach of a due-care duty implicit in whatever federal statute or regulation purportedly authorized the activities of the appellees. *Third*, common law negligence in the maintenance of government files. Yet, the *purpose* of each of these claims is to recover damages for defamation. Therefore, the statute of limitations applicable to actions for defamation determines whether the suit was timely filed.

The *en banc* court's action affirms the district court's dismissal of the complaint, because the activities complained of therein occurred in excess of one year before the

filing of the law suit and hence plaintiff's claim was barred by the District of Columbia one-year statute of limitations for libel. 12 D.C. Code § 301(4). (App. 60). The dissent argues that the issues presented are too unimportant for *en banc* consideration, and that the panel opinion therefore should be reinstated. Rehearing *en banc*, however, is proper to "secure or maintain uniformity of . . . decisions." F.R. App. P. 35. And since the panel decision in this case was inconsistent with *Volkert*, it was proper to maintain the uniformity of our decisions by reversing the panel decision on rehearing *en banc*.

ROBINSON, *Circuit Judge*, with whom EDWARDS and GINSBURG, *Circuit Judges*, join, dissenting: This case came before the court *en banc* after a divided panel[1] reversed a District Court order[2] dismissing as time-barred an action brought by appellant, the Church of Scientology of California, against four federal employees, the appellees herein.[3] The Church sought money damages on the basis of allegations that appellees had participated some ten years earlier in the preparation and dissemination of a Department of Labor memorandum containing statements falsely accusing the Church of certain bizarre activities. Today, without opinion, the court exercises its *en banc* power to affirm the District Court, for no apparent reason other than disagreement with the panel's decision. Because I am persuaded that nothing in this case presents a question of exceptional importance and that the majority panel opinion portends no conflict with our past holdings, I would vacate the order granting the rehearing *en banc* as improvident and dissolve the *en banc* court. Accordingly, I respectfully dissent.

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[1] *Church of Scientology* v. *Foley*, No. 77-2134 (D.C.Cir. Feb. 20, 1980) (majority and dissenting opinions). In accordance with current practice, the panel opinions and judgment were vacated when rehearing *en banc* was granted.

[2] *Church of Scientology* v. *Foley*, Civ. No. 77-0495 (D.D.C. Oct. 27, 1977), Appendix (App.) 60.

[3] The four employees are Shirley Foley, John T. McGill, Charlotte Murphy and June Norris. At all times relevant to this appeal, Foley was an employee of the Department of Labor, McGill was an officer of the Department of State, and Murphy and Norris were attorneys at the Internal Revenue Service. All four sought the dismissal on the ground that the action was barred by the District of Columbia statute of limitations applicable to defamation actions, D.C. Code § 12-301(4) (1973). They did not then claim official immunity from suit, but in their dismissal motion they made known their intention to address that subject if the motion was denied. App. 14. Because the motion was successful, an immunity defense never emerged.

I. BACKGROUND

The factual backdrop of this litigation is supplied by the Church's complaint.[4] The memorandum ultimately sparking the controversy was written by appellee Shirley Foley in November, 1967. It was a summary of an "investigation concerning the Church of Scientology . . . made in order to form an opinion as to whether the body can be considered a bona fide religious organization for the purpose of alien employment certification."[5] Foley reported that there was evidence that LSD and perhaps other drugs were widely used by assembled Church members; that an electric shock was administered to new members as a part of the Church's initiation ceremony; and that several persons in different parts of the United States had been shot, though not killed, because they had objected to the membership of their teen-aged children in the Church.[6] The memorandum cited appellees June Norris and Charlotte Murphy as the

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[4] In consequence of the issuance of a protective order deferring discovery and the dismissal of the Church's action shortly thereafter, the facts of the case were never fully developed. But it is well settled that on a motion to dismiss for failure to state a claim upon which relief can be granted, the complaint must be indulged the construction most favorable to the plaintiff and its allegations must be taken as true. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96–97 (1974); *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 515, 92 S.Ct. 609, 614, 30 L.Ed.2d 642, 649 (1972); *Jenkins* v. *McKeithen*, 395 U.S. 411, 421–422, 89 S.Ct. 1843, 1849, 23 L.Ed.2d 404, 416–417 (1969).

[5] Appendix to Appellants' Brief (Supp. App.) 1. The investigation apparently was conducted pursuant to a request by the Immigration and Naturalization Service to the Department of Labor.

[6] Supp. App. 1.

sources of this information,[7] and advised that they "urgently request[ed] that the Department of Labor withhold alien employment certification on any basis for the Church of Scientology."[8]

In February, 1968, the memorandum was forwarded to appellee John McGill,[9] who in turn supplied a copy to a branch office of the Immigration and Naturalization Service.[10] That, the Church asserts, led to initiation of visa-revocation proceedings against an alien Scientologist minister,[11] and to a long-term pattern of unremitting discrimination and harassment by governmental officials and agencies acting on the strength of the memorandum.[12]

The Church instituted the instant litigation in March, 1977.[13] In its complaint, it charged that the forerunning events infringed its First Amendment right to freely exercise religious beliefs and its Fifth Amendment right to due

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[7] Supp. App. 1. During the course of the investigation Foley had conferred with Norris and Murphy, who apparently based their statements upon prior Internal Revenue Service investigations of the Church. Supp. App. 1.

[8] Supp. App. 2.

[9] Appellant's Complaint, ¶ 14, App. 5-6 [hereinafter cited as Complaint].

[10] Complaint, ¶ 14, App. 5-6.

[11] Complaint, ¶ 13, App. 5.

[12] Complaint, ¶¶ 17-18, App. 6-7. In 1975, the Department of Labor officially acknowledged that the information incorporated into the memorandum "was irrelevant, unverified and based on hearsay," and slated the memorandum for destruction. Supp. App. 3.

[13] The Church asserted that it had no knowledge of the existence of the memorandum prior to the conclusion of a contested Freedom of Information Act proceeding in April, 1975. Complaint, ¶ 19, App. 7. While stating that it was long aware that it was the object of governmental discrimination and harassment, the Church says it previously was unable to identify the individuals responsible therefor. Complaint, ¶ 19, App. 7.

process of law.[14] The complaint averred that the memorandum incorporated information that appellees knew or reasonably should have known was false;[15] that the memorandum was maintained in the files of the Department of Labor despite the risk that the information would be disseminated to the detriment of the Church;[16] and that the harm feared actually came to pass.[17]

In response to the complaint, appellees moved for dismissal on the ground that the suit was precluded by the District of Columbia statute limiting the time period for commencement of defamation actions to one year.[18] Appellees also requested a protective order barring discovery pending disposition of the motion.[19] The District Court subsequently issued the protective order.[20] When the

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[14] Complaint, ¶ 20, App. 8. Invoking also the common law of the District of Columbia, Complaint, ¶ 2, App. 2, the Church laid claim to both federal-question and diversity jurisdiction, 28 U.S.C. §§ 1331(a), 1332(a)(1) (1976). Complaint, ¶ 2, App. 2. Damages exceeding $10,000 were sought for injuries assertedly suffered. Complaint ¶ 2, App. 2.

[15] Complaint, ¶ 11, App. 4.

[16] Complaint, ¶ 12, App. 4–5.

[17] Complaint, ¶¶ 11, 13–15, 17–18, App. 4, 5–7. In addition to the alleged invasions of the constitutional and common law rights themselves, the Church averred that its reputation was damaged; that it was hindered in its ability to enlist parishioners and financial contributions; that it became the continuous object of arbitrary discrimination and harassment by various governmental agencies and personnel; and that it was required to pay large sums of money for legal and related expenses in endeavors to regain its rights. Complaint, ¶¶ 18, 20, App. 7, 8.

[18] D.C. Code § 12-301(4) (1973), quoted in relevant part *infra* note 52.

[19] Supp. App. 4. Appellees argued that judicial economy would be promoted by deferring discovery until after disposition of the motion to dismiss. Supp. App. 4.

[20] *Church of Scientology* v. *Foley*, *supra* note 1 (order staying discovery, July 22, 1977), Record on Appeal at 17.

Church thereafter filed an amended complaint which, save for minor alterations, was identical to the original,[21] the court granted appellees' renewed motion to dismiss, concluding that the cause of action sounded only in defamation and thus was barred by the one-year statutory limitation.[22]

On appeal, the panel upheld the dismissal to the extent that the claim was one for defamation.[23] On the ground that the complaint might have stated some additional and different cause of action under either the Constitution or some unspecified federal statute or regulation, however, a majority of the panel reversed and remanded for further consideration.[24] The full court then agreed to rehear the case *en banc*, and now affirms the District Court's dismissal order.

II. Rule 35 and the Preeminence of the Three-Judge Court

The full panoply of powers conferred upon the federal courts of appeals are statutorily vested in three-judge panels.[25] A court of appeals may sit *en banc* only in the narrowly-defined circumstances specified by Rule 35 of the Federal Rules of Appellate Procedure, which declares that

> a hearing or rehearing [*en banc*] is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.[26]

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[21] App. 30.

[22] *Church of Scientology* v. *Foley*, *supra* note 2, App. 60.

[23] *Church of Scientology* v. *Foley*, *supra* note 1, at 5.

[24] *Id.* at 5–16.

[25] 28 U.S.C. § 46(c) (Supp. II 1976).

[26] Fed. R. App. P. 35(a).

Rule 35 governs all *en banc* hearings and rehearings. To be sure, its criteria are not entirely free from ambiguity, but an examination of the statutory and judicial developments culminating in promulgation of the rule, and of the more recent decisions construing its mandate, makes clear that courts of appeals are to function principally through divisions of three judges. Exceptions are appropriate only in rare instances, and, as we shall see, the instant case is not one of them.

A. *The Development of En Banc Review*

From the moment the federal courts of appeals were created in 1891,[27] the primary decisionmaking unit was

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[27] Act of March 3, 1891, ch. 517, § 2, 26 Stat. 826 (1891). The courts of appeal should not be confused with the original circuit courts, which also initially made use of a three-judge panel. A detailed account of the evolution of the federal courts may be found in C. Wright, A. Miller, & E. Cooper, Federal Practice §§ 3503–3504 (1975 ed.). For present purposes, however, a brief history of the precursors of the modern courts of appeals will suffice.

The circuit courts were created by the Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73. This legislation—in which Congress for the first time exercised the power granted it under Art. III, § 1, of the Constitution to establish the lower federal courts—provided for thirteen district and three circuit courts. The latter had both original and appellate jurisdiction. There were, however, no circuit judges as such; the circuit courts were conducted by panels consisting of two Supreme Court justices "riding circuit" and the judge of the district in which a given session was convened. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73. The regular panel was reduced to one Supreme Court justice and one district judge in 1793. Act of March 2, 1793, ch. 22, § 1, 1 Stat. 333. It was not until 1869 that Congress established circuit judgeships; by the Act of April 10, 1869, ch. 22, § 2, 16 Stat. 44, one judge was assigned to each circuit.

The origin of the current system can be traced to the creation of federal-question jurisdiction in 1875. Act of March 3, 1875,

statutorily limited to the three-judge panel.[28] Indeed, while the appointment of a fourth appellate judge to three circuits in 1911[29] stirred debate[30] over whether the courts of appeals could ever function as a whole rather than by three-judge divisions, it was not until 1940—almost half a century after federal appeals courts came into existence—that the Supreme Court sanctioned use of the *en banc* tribunal.[31]

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ch. 137, 18 Stat. 470. The resultant increase in caseloads necessitated restructuring of the judiciary and concomitant creation of the courts of appeals. See C. Wright, A. Miller, & E. Cooper, *supra*, § 3504 at 11; Bickel, *The Caseload of the Supreme Court* at 3 (1973); Hart & Wechsler, *The Federal Courts and the Federal System*, at 40–41 (Bator, Mishkin, Shapiro & Wechsler ed. 1973). Although the original circuit courts survived the 1891 legislation, that act terminated their appellate jurisdiction, Act of March 3, 1891, ch. 517, § 4, 26 Stat. 826 (1891); they were abolished in 1911, and their original jurisdiction was transferred to the district courts. Act of March 3, 1911, ch. 231, 36 Stat. 1087.

[28] Act of March 3, 1891, ch. 517, §§ 2, 4, 26 Stat. 826 (1891).

[29] Act of March 3, 1911, ch. 231, § 118, 36 Stat. 1087.

[30] The rather complex situation was explained by the Supreme Court in *Textile Mills Sec. Corp.* v. *Commissioner*, 314 U.S. 326, 62 S.Ct. 272, 86 L.Ed. 249 (1941):

> If § 117 [of the Judicial Code] were to be ready [*sic*] literally, the circuit court of appeals was to "consist" of only three judges in spite of the fact that Congress had already provided in some circuits for more than three circuit judges. Clearly, where there were four, all could not be members of a court of three. Yet there was plainly inferable a Congressional purpose to constitute in some circuits a circuit court of appeals of four judges.

Id. at 330, 62 S.Ct. at 275, 86 L.Ed. at 255–256 (footnotes omitted).

[31] As of 1938, all but two of the circuit courts of appeals had more than three judges. Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 Ford. L. Rev. 401, 402

In that year, the Third and the Ninth Circuits disagreed over the propriety of holding hearings before a court's full membership.[32] The Ninth Circuit held that "no more than three judges [could] sit in the Circuit Court of Appeals."[33] The Third Circuit, on the other hand, ruled that *en banc* sittings were permissible in "exceptional cases . . . [w]here . . . there is a difference in view among the judges upon a question of fundamental importance."[34] The Supreme Court resolved the conflict by affirming the Third Circuit's understanding,[35] thus approving for the first time the use of the *en banc* proceeding. The Court, however, agreed that an *en banc* sitting was not to be the norm; rather, it was a special technique designed to eliminate "[c]onflicts within a circuit"[36] and to promote "more effective judicial administration."[37]

Congress, in turn, confirmed the Court's interpretation of earlier legislation by the enactment in 1948 of 28 U.S.C. § 46(c).[38] Again, the leading role of the three-judge panel was emphasized:

(1974); Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities*, 40 N.Y.U.L. Rev. 563, 570 (1965).

[32] See *Lang's Estate* v. *Commissioner*, 97 F.2d 867 (9th Cir.), *certified question answered*, 304 U.S. 264 (1938), *rev'd*, *sub nom. Textile Mills Sec. Corp.* v. *Commissioner*, *supra* note 30; *Commissioner* v. *Textile Mills Sec. Corp.*, 117 F.2d 62 (3d Cir. 1940) (*en banc*), *aff'd*, 314 U.S. 326, 62 S.Ct. 272, 86 L.Ed. 249 (1941).

[33] *Lang's Estate* v. *Commissioner*, *supra* note 32, 97 F.2d at 869.

[34] *Commissioner* v. *Textile Mills Sec. Corp.*, *supra* note 32, 117 F.2d at 71.

[35] *Textile Mills Sec. Corp.* v. *Commissioner*, *supra* note 30.

[36] 314 U.S. at 335, 62 S.Ct. at 277-278, 86 L.Ed. at 258.

[37] *Id.*

[38] Act of June 25, 1948, ch. 646, 62 Stat. 878, now codified at 28 U.S.C. § 46(c) (Supp. II 1976).

> Cases and controversies shall be heard and determined by a court or division of not more than three judges unless a hearing or rehearing before the court *en banc* is ordered by a majority of the circuit judges of the circuit who are in active service.[39]

As the statutory language suggested, this section was intended to "continue[ ] the tradition of a three-judge appellate court and make[ ] the decision of a division, the decision of the court, unless rehearing in banc is ordered."[40] Above all, as the Supreme Court was soon thereafter to observe, Congress was concerned with "preserving the 'tradition' of the three-judge courts against further inroads."[41]

Some years later, the Court put to rest any lingering doubts about the paramount importance of the three-judge court and the concommitant limitations on resort to *en banc* decisionmaking. The Court admonished:

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[39] *Id.*

[40] Revision of Federal Judicial Code, Preliminary Draft (of H.R. 3498, 79th Cong., 1st Sess.) Committee Print (1949), quoted in *Western Pac. R.R. Corp.* v. *Western Pac. R.R. Co.*, 345 U.S. 247, 256 n.13, 73 S.Ct. 656, 660 n.13, 97 L.Ed. 986, 993 n.13 (1952).

[41] *Western Pac. R.R. Corp.* v. *Western Pac. R.R. Co.*, *supra* note 40, 345 U.S. at 256, 73 S.Ct. at 661, 97 L.Ed. at 994. In *Western Pacific*, litigants sought to establish a statutory right to compel each member of a court of appeals to give formal consideration to an application for rehearing *en banc*. The Supreme Court held that the courts of appeals need not adopt any particular procedure, but must allow parties to suggest rehearings *en banc* to the judges authorized to initiate such proceedings. See *id.* at 249-250, 268, 73 S.Ct. at 657-658, 666, 97 L.Ed. at 990, 999. In reaching this conclusion, the Court declared that it was desirable to allow the judges " 'to provide for a court of more than three judges when in their opinion *unusual circumstances* make such action advisable.' " *Id.* at 251, 73 S.Ct. at 658, 97 L.Ed. at 991, quoting Annual Report of Attorney General (1938) at 231 (footnote omitted) (emphasis supplied).

> *En banc* courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit.[42]

B. *Interpretations of Rule 35*

The original view of limited use of the *en banc* court of appeals has frequently been mirrored in judicial opinions issued since promulgation of Rule 35. There is now general agreement among the circuits that the "truly extraordinary"[43] cases meriting *en banc* treatment are those involving "issue[s] likely to affect many other cases"[44]—in other words, those of real significance to the legal process as well as to the litigants.[45] Contrary to the view one must perforce infer from the court's decision today, the *en banc* court is not an institution for monitoring panel decision-making; it flies in the face of both the intent of Congress

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[42] *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685, 689, 80 S.Ct. 1336, 1339, 4 L.Ed.2d 1491, 1495 (1960). This admonition is also reflected in subsequent opinions dealing with related subjects. See *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 626, 94 S.Ct. 2513, 2516, 41 L.Ed.2d 358, 362 (1974).

[43] *Boraas* v. *Village of Belle Terre*, 476 F.2d 806, 829 (2d Cir. 1973) (statement of Mansfield, J.).

[44] *Walters* v. *Moore-McCormack Lines, Inc.*, 312 F.2d 893, 894 (2d Cir. 1963) (statement of Lumbard, C.J.).

[45] See *Gilliard* v. *Oswald*, 557 F.2d 359 (2d Cir. 1977) (statement of Kaufman, C.J.); *Galella* v. *Onassis*, 487 F.2d 986, 1004 (2d Cir. 1973); *id.* at 1005 (dissenting opinion); *Eisen* v. *Carlisle & Jacquelin*, 579 F.2d 1005, 1021-1022 (2d Cir. 1973) (dissenting opinion); *Boraas* v. *Village of Belle Terre*, *supra* note 43, 476 F.2d at 829 (statement of Mansfield, J.); *United States* v. *Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) (*en banc*); *United States* v. *Page*, 302 F.2d 81, 86 (9th Cir. 1962) (*en banc*) (pre-Rule 35 decision).

and Supreme Court precedent to use the Rule 35 procedure " 'merely' to correct individual injustices or 'mistakes."[46] And while Rule 35 looks to preserving the uniformity of a circuit's decisions, the courts agree that the availability of *en banc* rehearings to cure intra-circuit conflicts does not justify "a vote for reconsideration by the entire court merely because [a judge] disagrees with the result reached by the panel."[47]

The need for judicial restraint in invoking the *en banc* mechanism is readily understood. Because it engages the attention of every active judge, consideration of a case *en banc* drains judicial resources while burdening the litigants with added expense and delay.[48] And because it

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[46]*Galella* v. *Onassis*, *supra* note 45, 487 F.2d at 1005 (dissenting opinion), quoting *Eisen* v. *Carlisle & Jacqueline*, *supra* note 45, 479 F.2d at 1021-1022 (dissenting opinion). In the exceptional case, however, an *en banc* rehearing may be appropriate to cure gross individual injustice. See *Eisen* v. *Carlisle & Jacqueline*, *supra* note 45, 479 F.2d at 1021 n.2 (dissenting opinion). Indeed, Rule 35 directs that "ordinarily" a rehearing will not be ordered in the absence of its two enumerated factors; it does not establish a blanket rule.

[47]*Gilliard* v. *Oswald*, *supra* note 45, 557 F.2d at 359 (statement of Kaufman, C.J.). Accord, cases cited *supra* note 45.

[48]See *Gilliard* v. *Oswald*, *supra* note 45, 557 F.2d at 359 (statement of Kaufman, C.J.); *Galella* v. *Onassis*, *supra* note 45, 487 F.2d at 1005 (per curiam); *Eisen* v. *Carlisle & Jacqueline*, *supra* note 45, 479 F.2d at 1021-1022 (dissenting opinion); Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 96 (1954); Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 Ford. L. Rev. 401, 417-418 (1974). The degree to which *en banc* rehearings are disfavored is illustrated by statistics for fiscal 1980. In that year, 23,200 appeals were filed in the federal courts of appeals; and 10,598 were orally heard or submitted on briefs, of these only 65 cases were heard *en banc*. See 1980 Annual Report of the Director, Administrative Office of the United States Courts at 43, Table 1; 49, Table 7.

often leads to a multiplicity of opinions, a too-frequent corollary of *en banc* decisionmaking is the inability to offer authoritative guidance,[49] the *raison d'etre* of the procedure. In this light, it is hardly surprising that Rule 35 explicitly declares that *en banc* "hearing or rehearing is not favored."[50] On the contrary, the collective wisdom of the federal judiciary is that *en banc* review must be soundly justified, else the game will not be worth the candle.

In sum, the history of the *en banc* practice, the plain language of Rule 35, and consistent judicial interpretation of the purposes and permissible uses of *en banc* courts are in complete accord: barring extraordinary circumstances, only three-judge panels may appropriately hear and decide cases coming before the courts of appeals.

III. The Present Case

The District Court dismissed the Church's action solely on the ground that it was barred by the District of Columbia statute of limitations applicable to actions for libel or slander.[51] In the court's view, the Church's complaint

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[49] See *Gilliard* v. *Oswald*, *supra* note 45, 557 F.2d at 359 (statement of Kaufman, C.J.); Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 Ford. L. Rev. 401, 417 & n.162 (1974).

[50] Fed. R. App. P. 35(a), quoted in relevant part in text *supra* at note 26.

[51] *Church of Scientology* v. *Foley*, *supra* note 2, App. 60. Since there is no federal statute of limitations applicable to the federal claims in suit, the court properly looked for the most analogous District of Columbia limitation. *Runyan* v. *McCrary*, 427 U.S. 160, 180, 96 S.Ct. 2586, 2599, 49 L.Ed.2d. 415, 430–431 (1976); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295, 302–303 (1975); *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 701–704, 86 S.Ct. 1107,

"sound[ed] most nearly in defamation," and was intercepted by the local one-year limitation on actions therefor.[52] The dispute on appeal is whether the Church had a legitimate claim other than for defamation, and thus is able to benefit from the statute's residual provision of three years for actions "for which a limitation is not otherwise specifically prescribed."[53]

A. *The Possible Claims*

Three potential claims have been suggested: infringement of rights secured to the Church by the First and Fifth Amendments; breach of a due-care duty implicit in whatever federal statute or regulation purportedly au-

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1110-1113, 16 L.Ed.2d 192, 197-199 (1966); *Cope* v. *Anderson*, 331 U.S. 461, 463, 67 S.Ct. 1340, 1341, 91 L.Ed. 1602, 1606-1607 (1947). Whether, however, it picked the right provision is another matter.

[52] *Church of Scientology* v. *Foley*, *supra* note 2, App. 60. In relevant part, the District of Columbia statute of limitations provides:

> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues: . . .
>
> (4) for libel [or] slander, . . .—1 year; . . .
>
> (8) for which a limitation is not otherwise specially prescribed—3 years . . . .

D.C. Code § 12-301 (1973).

[53] See D.C. Code § 12-301(8) (1973), quoted *supra* note 52. The case was submitted to us on the theory that no cause of action accrued until the Church became aware of the memorandum in 1975. Compare, *e.g.*, *Fitzgerald* v. *Seamans*, 180 U.S.App.D.C. 75, 83-86, 553 F.2d 220, 228-231 (1977); *Jones* v. *Rogers Memorial Hosp.*, 143 U.S.App.D.C. 51, 52-53, 442 F.2d 773, 774-775 (1971); *Emmett* v. *Eastern Dispensary & Cas. Hosp.*, 130 U.S.App.D.C. 50, 55-58, 396 F.2d 931, 936-939 (1967). I intimate no view in this regard.

thorized the activities in which appellees engaged; and common law negligence in the formation of governmental files. If any one of these claims is valid, the three-year limitation period may be legally viable.[54] The issue, then, is whether the Church could have supported a claim for relief under one or more of these theories.[55] I see no reason whatsoever for summoning this court's *en banc* authority to conduct that inquiry.

Certainly no question justifying an *en banc* decision is posed by the Church's constitutional claims.[56] It is well settled that a cause of action for money damages may be implied directly from either the First or the Fifth Amendment.[57] The issue here is not of significant import;

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[54] See the discussion in note 65 *infra*.

[55] "[I]n appraising the sufficiency of the complaint [federal courts] follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957). Accord, *Haines* v. *Kerner*, 404 U.S. 519, 520-521, 92 S.Ct. 594, 596, 30 L.Ed.2d 652, 654 (1972); *Jenkins* v. *McKeithen*, *supra* note 4, 395 U.S. at 421-422, 89 S.Ct. at 1849, 23 L.Ed.2d at 416-417; *Sass* v. *District of Columbia*, 114 U.S.App.D.C. 365, 366, 316 F.2d 366, 367 (1963).

[56] See text *supra* at note 14.

[57] The Supreme Court's decision in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 395-397, 91 S.Ct. 1999, 2004-2005, 29 L.Ed.2d 619, 626-627 (1971), definitively established that a cause of action for money damages may be implied directly from the Constitution. *Bivens* dealt with the Fourth Amendment, but subsequently the Court has held that causes of action similarly may be derived from the Fifth. See *Davis* v. *Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). See also, *e.g.*, *Payne* v. *District of Columbia*, 182 U.S.App.D.C. 188, 559 F.2d 809 (1977); *United States ex rel. Moore* v. *Koelzer*, 457 F.2d 892, 894 (3rd Cir. 1972);

it is simply whether proof of the events the Church complains of would establish official misconduct rising to the level of constitutional transgression.[58] That question is largely factual, and the answer could have little if any impact on proceedings other than those at hand.[59] Consequently, the constitutional issues do not merit use of the special decisionmaking power of the full court.

The further question whether appellees have disregarded a statutorily-imposed obligation to exercise reasonable care involves very similar considerations. This court at least twice previously has held that such a duty, and a concomitant remedy for its breach, may follow from imposition of a statutory responsibility to manage governmental records,[60] and the panel majority felt that perhaps the Church could show that such a duty existed in this case.[61] The panel decision forged no novel doctrine,

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Bethea v. *Reid*, 445 F.2d 1163, 1164-1165 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061, 92 S.Ct. 747, 30 L.Ed.2d 749 (1972); *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146, 1155 (4th Cir. 1974); *Revis* v. *Laird*, 391 F.Supp. 1133, 1138-1139 (E.D. Calif. 1975); *Patmore* v. *Carlson*, 392 F.Supp. 737, 740 (E.D. Ill. 1975). This court has also held that a cause of action may be implied from the First Amendment. *Dellums* v. *Powell*, 184 U.S.App.D.C. 275, 302-304, 566 F.2d 167, 194-196 (1977). Although the Supreme Court has not itself addressed that question, its decision in *Davis* suggests that a valid claim may exist for any violation of a constitutional right, at least where Congress has provided no other suitable remedy.

[58] Decisions involving factual questions, which are unlikely to have any significant precedential effect, are inappropriate for *en banc* review. See cases cited *supra* note 45.

[59] As noted earlier, see text *supra* at notes 43-46, an *en banc* decision is not justified in such instances. See cases cited *supra* notes 44-45.

[60] *Tarlton* v. *Saxbe*, 165 U.S.App.D.C. 293, 299-303, 507 F.2d 1116, 1122-1126 (1974); *Menard* v. *Saxbe*, 162 U.S.App.D.C. 284, 296, 498 F.2d 1017, 1029 (1974).

[61] *Church of Scientology* v. *Foley*, *supra* note 1, at 7-12.

nor did it conflict with our precedents. I fail to see how the panel's remand for exploration of this avenue to possible relief warrants *en banc* review.

Nor, in my view, does the Church's common law theory of liability deserve *en banc* treatment. The Church suggests that there was a nonfederal duty, grounded in District of Columbia law, to use due care in assembling and maintaining federal records.[62] But we no longer have either the responsibility or the prerogative to fashion the common law of the District of Columbia,[63] or to act *en banc* to maintain its uniformity. Indeed, our obligation as a federal court dealing with a nonfederal claim is to take

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[62] That question crept into the case when the Church invoked diversity of citizenship as one of the District Court's jurisdictional bases. See note 14 *supra*. I recognize that the federal common law might also provide a cause of action in this case, see generally *Wheeldin* v. *Wheeler*, 373 U.S. 647, 83 S.Ct. 1447, 10 L.Ed.2d 605 (1965); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 65 S.Ct. 574, 87 L.Ed. 833 (1945), but the issue is raised neither by the parties nor in the panel opinion, and it therefore need not be addressed on this appeal.

[63] The District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, tit. I, § 111, 84 Stat. 475, constituted the District of Columbia Court of Appeals "[t]he highest court of the District of Columbia," D.C. Code § 11-102 (1973), a role this court theretofore occupied. As we have observed, "[t]hat court, and not this court, is now the final expositor of local law." *Thompson* v. *United States*, 179 U.S.App.D.C. 76, 80, 548 F.2d 1031, 1035 (1976) (footnote omitted); and our decisions subsequent to the effective date of the Act do not bear the imprimatur of binding interpretations in that area. *Bethea* v. *United States*, 365 A.2d 64, 71 (D.C. App. 1976); *District of Columbia* v. *Schwerman Trucking Co.*, 327 A.2d 818, 820-821 (D.C. App. 1974); *Small* v. *United States*, 304 A.2d 641, 643 (D.C. App. 1973); *M.A.P.* v. *Ryan*, 285 A.2d 310, 312 (D.C. App. 1971).

nonfederal law just as it is.[64] Against this background, I cannot conceive of anything less appropriate for *en banc* consideration than a matter of purely local law.[65]

B. *A Proposed Disposition*

While it seems clear that this case presents no issue worthy of *en banc* review, the question of how properly to

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[64] *Tuxedo Contractors, Inc.* v. *Swindell-Dressler Co.*, 198 U.S.App.D.C. 426, 428 n.14, 613 F.2d 1159, 1161 n.14 (1979); *Lee* v. *Flintkote Co.*, 193 U.S.App.D.C. 121, 124 & n.14, 593 F.2d 1275, 1278 & n.14 (1979).

[65] Appellees have implied that the panel decision conflicts with *District of Columbia Armory Bd.* v. *Volkert*, 131 U.S.App.D C. 74, 402 F.2d 215 (1968). See Supplemental Brief for Appellees at 13–18. Close comparison satisfies me that there is no inconsistency between the two. *Volkert* held that a suit claiming property damage was governed by the District's three-year limitation on actions "for the recovery of damages for an injury to real or personal property," D.C. Code § 12–301(3) (1973), despite an assertion of alternative contract and tort theories of liability. "Where," the court said, "real or personal property is injured and suits are brought to recover damages, we think Congress has said quite clearly that 3 years is the limitation period, whether contract (sealed or unsealed, written or oral) or tort be made the legal vehicle of recovery." 131 U.S.App.D.C. at 79, 402 F.2d at 220. Here, however, the one-year limitation affects the Church only to the extent that recovery is sought for "libel" or "slander." D.C. Code § 12–301(4) (1973), quoted in relevant part *supra* note 52. The Church alleges that the Foley memorandum not only curtailed its ability to attract adherants and contributions, but also precipitated governmental discrimination and harassment frustrating exercise of its First and Fifth Amendment rights and necessitating large financial expenditures to preserve them. Complaint, ¶¶ 18–20, App. 7–8; Amended Complaint, ¶¶ 18, 20, App. 35–36. These constitutional claims are not congruent with libel or slander, nor is the the panel decision in doctrinal collision with *Volkert*.

dispose of it remains. Usually, of course, courts do not face that need because they simply refused to accord inappropriate cases an *en banc* audience. Occasionally, however, courts have discovered, after convening *en banc*, viewing briefs and hearing oral argument, that a given case does not warrant consideration by every active judge. In just such a situation the Seventh Circuit withdrew its order granting a rehearing, dissolved the *en banc* court and reinstated the panel opinion.[66] And this court, when confronted by a similar problem, concluded that because of the limited importance of the case it was inappropriate to provide detailed "exposition *en banc* of the legal points beyond that already provided in the majority and minority opinions of the panel,"[67] and accordingly reissued the panel opinions.[68] An obvious parallel is the Supreme Court's practice of dismissing writs of certiorari when, after closer study of the case, it becomes evident that the writ was granted on a mistaken impression of the record;[69] that the case is an unsuitable one in which to issue an au-

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[66] *United States* v. *Rosciano*, *supra* note 45, 499 F.2d at 175.

[67] *Verkouteran* v. *District of Columbia*, 139 U.S. App.D.C. 303, 305, 433 F.2d 461, 463 (1970).

[68] *Id.* Moreover, in *Bulluck* v. *Washington*, 152 U.S.App.D.C. 39, 65, 468 F.2d 1096, 1122 (1972), we dissolved our order granting *en banc* rehearing and continued in effect the panel decision because we were equally divided on the merits.

[69] *Burrell* v. *McCray*, 426 U.S. 471, 472, 96 S.Ct. 2640, 2641, 48 L.Ed.2d 788–789 (1976) (concurring opinion); *Bostic* v. *United States*, 402 U.S. 547, 548, 91 S.Ct. 2174, 29 L.Ed.2d 102, 103 (1971); *Johnson* v. *Massachusetts*, 390 U.S. 511, 88 S.Ct. 1155, 20 L.Ed.2d 69, 70 (1968); *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183, 79 S.Ct. 710, 713, 3 L.Ed.2d 710, 713 (1959).

thoritative decision;[70] or that the case is simply too unimportant to merit the Court's attention.[71]

Similar action, I believe, is demanded here. Basic rules of judicial housekeeping admonish courts to avoid addressing issues they need not resolve. Since reaching the merits here can serve none of the accepted purposes of the *en banc* process, there is no occasion for a full-court decision of the case. On the contrary, the court would do well to conserve its resources and preserve the authority of its *en banc* voice by reserving both for those fundamentally important cases where the collective attention and wisdom of its full bench is both necessary and appropriate.

In my view, no issue meriting *en banc* attention has been tendered by the parties or uncovered by the court. Rehearing *en banc*, I think, was improvidently granted. I would therefore dissolve this *en banc* tribunal and reinstate the panel opinions.

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[70] *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 365-366, 95 S.Ct. 449, 461, 42 L.Ed.2d 477, 492 (1974) (dissenting opinion); *DeBacker* v. *Brainard*, 396 U.S. 28, 30-31, 90 S.Ct. 163, 165, 24 L.Ed.2d 148, 152-153 (1969); *Massachusetts* v. *Painte*, 389 U.S. 560, 561, 88 S.Ct. 660, 661, 19 L.Ed.2d 770, 771 (1968).

[71] *Piccirillo* v. *New York*, 400 U.S. 548, 549, 91 S.Ct. 520, 521, 27 L.Ed.2d 596, 598 (1971); *Rudolph* v. *United States*, 370 U.S. 269, 270, 82 S.Ct. 1277, 1278, 8 L.Ed.2d 484, 486 (1962).